No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JANET SIMPSON, WARREN SIMPSON,
WHITNEY SIMPSON and WESLEY SIMPSON,

Petitioners,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JANET SIMPSON
WARREN SIMPSON
WHITNEY SIMPSON
WESLEY SIMPSON
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Appearing, Pro Se

QUESTIONS PRESENTED

Whether the Internal Revenue Service can make unauthorized disclosures, pursuant to 26 U.S.C. Section 6103, of return and return information under the guise of conducting an investigation against another taxpayer and not be subjected to penalties since the Simpsons were not "taxpayers" as defined by 26 U.S.C. Section 7431.

All parties to the instant case are in the caption.

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No. 93-

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—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Janet Simpson, Warren Simpson, Whitley Simpson and Wesley Simpson, respectfully pray that this Honorable Court issue a Writ of Certiorari, and review the judgment and order of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court of Appeals' opinion affirming the decision of

the United States District Court for the Northern District of Florida, Pensacola Division, was entered on February 16, 1993, and was unpublished; see ***Simpson, et al., v. United States***, Appeal No. 92-2087 (11th Cir. 1993). The opinion of the Court of Appeals appears in the Appendix hereto at A-1.

The opinion of the United States District Court from which appeal was taken to the Court of Appeals for the Eleventh Circuit was not published. That opinion of the District Court appears in the Appendix hereto at B-1.

JURISDICTION

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Eleventh Circuit on February 16, 1993. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that all issues pertaining to the cause of action herein are predicated on the fundamental right of due process of law. The statutory provisions involved are 26 U.S.C. Sections 6103 and 7431.

STATEMENT OF THE CASE

On August 15, 1991, the Simpsons filed a complaint with the United States District Court for the Northern District of Florida, Pensacola Division, naming as defendant the United States of America.

On October 15, 1991, the government filed a motion to dismiss. The thrust of the government's argument was that the District Court was without jurisdiction pursuant to 26 U.S.C. Section 7431 because the letter written by Special Agent Kohn--which contained the unauthorized disclosures--identified Wilford Simpson as the target of the investigation and not the Simpsons.

Thus, the government reasoned that by the simple expedient of only stating one member of the family was under investigation on its letter authorized the IRS to disclose the Simpsons identity and request financial information pertaining to them: "front and back copies or original cancelled checks for all payments made to or on behlaf of ... Janet Simpson, Warren Simpson, Whitney Simpson or Wesley Simpson ... record of cash payments to or on behalf of the above-named individuals."

The Simpsons' attorney at the time failed to timely respond to the government's motion to dismiss and his motion to file out of time was denied.

On November 27, 1991, the District Court's Order granting the government's motion to dismiss was signed by the District Court and entered on December 2, 1991.

The thrust of the District Court's Order was that the Simpsons failed to state a claim for wrongful disclosure of return or return information under 26 U.S.C. Section 7431 since no link was established between the disclosures and the Simpsons' status as taxpayers.

The Simpsons timely petitioned the Eleventh Circuit. The Eleventh Circuit affirmed the District Court's Order on February 16, 1993 ***per curiam***.

REASONS FOR GRANTING THE WRIT

This case presents a substantial issue of the application of whether the Internal Revenue Service can make an unauthorized disclosure of return or return information and then deem the individuals not to be taxpayers pursuant to 26 U.S.C. Sections 6103 and 7431.

(A) Introduction.

Title 26, United States Code, Section 6103 forbids the disclosure of return or return information. Return or return information includes the taxpayer's identity or the fact that the taxpayer is under investigation or subject to further investigation. Section 6103 provides that:

(a) General rule.—Returns and return information shall be

confidential, and except as authorized by this title...

(2) no officer or employee of the United States, ... shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

The Code defines "return information" in broad terms as follows:

[A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or sure and return information as follows:

(2) Disclosure is defined as the making known of tax returns and return information in any manner.

IR Manual (21)10(2).

(3) Return information, includes any information, other than the taxpayer's return itself, which IRS has obtained from any source or developed through any means which relates to a taxpayer's return or to the liability or potential liability of any person under the Internal Revenue Code for any tax, penalty, interest, fine, forfeiture or other imposition or offense. (See IRC 6103(b)(2).) The information typically found in examination reports, special agents' reports, taxpayer delinquent accounts, and data contained in transcripts of account and on the Integrated Data Retrieval Systems (IDRS) is return information.

IR Manual (21)10(3).

Special Agent Lynda Lee Khol (hereinafter "Khol") caused an IRS Administrative Summons to be issued on or

about August 10, 1989, to the custodian of the First Federal Bank of DeFuniak Springs, Florida. Such summons required any and all records pertaining to the financial matter of Wilford Simpson, Janet Simpson and "Ellis Ag Inc." for the tax years 1984 through 1988. Khol caused another IRS Administrative Summons to be issued on or about August 11, 1989, to the custodian of Sun Bank. Such summons also required any and all records pertaining to the financial matters of Wilford Simpson, Janet Simpson and "Ellis Ag Inc."

On or about August 18, 1989, Khol issued and mailed a voluminous number of IRS Circular Letters which disclosed the identity of the Simpsons and requested the following:

"4. Method of Payment:

a. front and back copies or original cancelled checks for all payments made to or on behalf of Wilford Simpson, Ellis Ag Inc., Janet Simpson, Warren Simpson, Whitney Simpson or Wesley Simpson.

b. record of cash payments to or on behalf of the above-named individuals."

The Handbook for Special Agents defines Circular Letters and cautions the agent to be judicious when utilizing same:

"Mail circularization is a written request to third parties for information where more than ten letters of a similar nature are sent. Mail circularization to obtain third party evidence may be, under certain circumstances, the most practical means of obtaining documentary evidence in an investigation when a large number of persons, widely scattered geographically, need to be reached. If not judiciously used, mail circularization may result in unwarranted embarrassment to the taxpayer or cause unfavorable public reaction, thus subjecting the Service to criticism." IR Manual 9781, Section 347.1.

Furthermore, the Special Agents are prohibited from issuing Circular Letters without prior approval of the Chief, Criminal Investigation Division:

"To ensure proper use of this technique, mail circulariza-

tion will not be undertaken in any case without the prior approval of the Chief, Criminal Investigation Division, including approval of the letters to be sent out. Care must be exercised in approving mail circularization to ensure that mail inquiries are sent only to those parties who, in view of the Chief, Criminal Investigation Division, are likely sources of information; and obtaining the information by other means, if at all possible, would not be practical because of either delays in investigation, costs involved, or similar reasons. Caution must be exercised not to damage the reputation of the taxpayer by making the letter either offensive or suggestive of any wrongdoing by the taxpayer."

"Appropriate wording could be "The Internal Revenue is conducting an investigation of.... "When mailing circularizations, all such letters will be signed by the special agent with prior approval of the Chief, Criminal Investigation Division, indicated on the file copy." IR Manual 9781, Section 347.2.

In the instant case, Khol did not receive the requisite approval to send the Circular Letters. Therefore, each and every letter was an unauthorized disclosure of return and return information.

26 U.S.C. Section 7431 authorizes a civil cause of action and damages for unauthorized disclosure of return and return information:

"(a) In General.

"(1) Disclosure by employee of United States. If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States."

"(c) Damages.

"In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant

shall be liable to the plaintiff in an amount equal to the sum of—

"(1) the greater of—

"(A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable,...."

(B) The District Court erred by ruling that the Simpsons were not taxpayers within the meaning of Section 7431.

The thrust of the District Court's ruling is that the Simpsons are not "taxpayers" within the purview of 26 U.S.C. Section 7431. Thus, the District Court reasoned that the Simpsons did not establish a link between the alleged disclosures and their status as taxpayers.

The District Court's ruling was in error since the meaning of the term "taxpayer" as used in Section 6103 means any person with respect to whom the information is received—not merely a person whose potential liability is the direct subject of the Secretary's interest. ***Ryan v. Bureau of Alcohol, Tobacco and Firearms***, 715 F.2d 644 (D.C.Cir. 1983).

The ***Ryan*** Court's reasoning is clearly on point with the case at bar. There, the Court determined that to say the word "taxpayer" should refer only to a person whose potential liability is the subject of the Secretary's interest would be an injustice:

"Besides the fact that this interpretation would needlessly give the word 'taxpayer' a meaning different from that used in the phrase 'taxpayer's identity' earlier in the same paragraph, it would produce results extremely unlikely to have been intended. It would mean, for example, that information gathered by the Secretary with respect to the earnings of a minor, in order to determine the tax liability not of the minor but of the parent claiming a deduction on the basis of contributing more than half of the minor's support ... would enjoy none of the confidentiality protections of the Code. [In addition, 26 U.S.C.

6103(b)(2) refers] to the determination of the existence, or possible existance, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense...." ***Id.***

It is unequivocally clear that the administrative summons was directed to Janet Simpson as well as her husband, Wilford Simpson. Furthermore, the Circular Letters requested information concerning payments in cash or checks payable to the Simpsons. Thus, the Simpsons are squarely defined as taxpayers within the purview of Section 6103 and 7431. Furthermore, the term "taxpayer" as defined by 26 U.S.C. Section 7701(a)(14) means "any person subject to any internal revenue tax."

Simply stated, any person who is a citizen of the United States is a "taxpayer" for the purposes of the statutes which govern disclosure of return and return information. See e.g., ***Templeton v. I.R.S.***, 650 F.Supp. 202 (N.D.Ind. 1985), ***aff'd*** 808 F.2d 838 (1986). It is undisputable that the Circular Letters were directed at the Simpsons and Wilford Simpson.

Finally, the federal courts have held in cases similar to the case at bar that disclosure of return or return information in pursuance of unlawful liens and levies violates the requirements of 26 U.S.C. Section 6103(a) governing confidentiality and disclosure of return and return information. Such disclosure is not authorized under Section 6103(k)(6) which governs disclosure of Internal Revenue Service officers and employees for investigative purposes. See e.g., ***Rorex v. Traynor***, 771 F.2d 383 (8th Cir. 1985). See also ***Barrett v. United States***, 795 F.2d 446 (5th Cir. 1986); ***Chandler v. United States***, 687 F.Supp. 1515 (D.Utah 1988), ***aff'd per curiam***, U.S. App. Lexis 16299 (10th Cir. 1989); ***Nollsch v. United States***, Civil No. C89-0328J (D.Wyoming, September, 1990); ***William E. Schrambling Accountancy Corp. v. United States***, 689 F.Supp. 1001 (N.D.Cal. 1988) (United States was liable for unauthorized disclosure of return information when a levy was

issued without a final notice and demand); ***Husby v. United States***, 672 F.Supp. 442 (N.D.Cal. 1987) (United States was liable for unauthorized disclosure of return information when a levy was issued without a valid assessment); ***Johnson v. Sawyer***, 640 F.Supp. 1126, 1131 (S.D.Tex. 1986); ***Mid-South Music Corporation v. United States***, 85-2 USTC 9782, p. 90,153 (M.D.Tenn. 1985).

Furthermore, there are no exceptions which pertain to the instant case that prohibit the imposition of liability against the United States in Section 7431. Subsection (c) of 7431 states willful disclosure or a disclosure that is a result of gross negligence gives rise to ***punitive*** damages. However, subsection (1) creates a cause of action for negligence with its implied duty of care, and allows an award of $1,000 damages for each disclosure resulting from the negligence. Negligence was interpreted by the ***Chandler*** Court to mean simple negligence. ***Chandler***, 687 F.Supp. at 1521. Section 7431(b) only provides for an exception when disclosures result from a "good faith, but erroneous, interpretation of section 6103." Section 7431(b) simply does not create a general good faith defense; on its face it applies only to good faith ***misinterpretations*** of section 6103. See ***Husby***, 672 F.Supp. at 445; ***William E. Schrambling Accountancy Corp.***, 689 F.Supp. at 1007. See also ***Huckaby v. United States Dept. of Treasury***, 794 F.2d 1041 (5th Cir. 1986) ("[W]hether a reasonable IRS agent would have known of rights provided by [the sections at issue], and of his own agency's applicable regulations and internal rules."); ***Heller v. Plave***, 59 AFTR2d 87-637 (D.C.S.D. Fl. 1987).

The Eight Circuit in ***Rorex v. Traynor***, 771 F.2d 383 (8th Cir. 1985) has addressed very similar issues. There, two taxpayers had executed installment agreements to pay income taxes owed for three previous years. After a dispute over whether payments were being timely made, the taxpayers entered into a second installment agreement with identical

terms to the first. The revenue officer who had executed the agreement did so subject to the approval of his supervisor. The supervisor disapproved the agreement, and the agent allegedly informed the taxpayers that full payment was due, and approximately one month later served a notice of levy on the taxpayer's bank to recover the owed tax.

The trial court found that the second agreement remained in effect despite the disapproval, and thus the Code did not authorize a levy on the taxpayer's accounts. Taxpayers were awarded damages for wrongful disclosure to the bank. On appeal, the revenue officer argued that disclosures were authorized as long as the information given to the bank was necessary to execute the levy. Whether the levy is lawful, he contended, is irrelevant to the authorization for levy found in the Code. In rejecting the agent's argument, the Eighth Circuit said:

"Under Traynor's interpretation, disclosure would not violate section 6103 so long as no more information was disclosed than was necessary to effectuate a levy, even if the levy was not authorized by the Internal Revenue Code. Thus, Traynor's interpretation would open a significant loophole in section 7217 in that IRS employees could disclose return information about any taxpayer simply by making the disclosure in the form of a notice of levy. The employees would never be subject to liability under section 7217 because their conduct would never satisfy the first preresquisite to liability. ***Traynor***, 771 F.2d at 386.

Thus, if a prerequisite to the Secretary's exercise of authority has not been fulfilled, in this instant case Agent Khol was not authorized to issue the Circular Letters, then, the disclosures of the Simpsons on such letters were unauthorized and violative of Sections 6103 and 7431. See ***Rorex v. Traynor***, 771 F.2d 383 (8th Cir. 1985); ***Chandler v. United States***, 687 F.Supp. 1515 (D.Utah 1988), ***aff'd per curiam***, U.S. App. Lexis 16299 (10th Cir. 1989); ***William E.***

Schrambling Accountancy Corp. v. United States, 689 F.Supp. 1001 (N.D.Cal. 1988); ***Husby v. United States***, 672 F.Supp. 442 (N.D.Cal. 1987); ***Johnson v. Sawyer***, 640 F.Supp. 1126, 1131 (S.D.Tex. 1986); ***Mid-South Music Corporation v. United States***, 85-2 USTC 9782, p. 90,153 (M.D.Tenn. 1985).

Therefore, this Court should determine that the District Court and the Eleventh Circuit's per curiam affirmation was in error by ruling that the Simpsons were not "taxpayers" within the meaning of Section 7431. The merits of the Simpsons claims were not addressed by the District Court or the Eleventh Circuit. For the purposes of this appeal such allegations in the Complaint that Agent Khol was not authorized to issue the letters must be assumed correct.

CONCLUSION

The District Court and the Eleventh Circuit erred when it ruled that the Simpsons were not "taxpayers" within the purview of 26 U.S.C. Section 7431. This Court should issue its Writ of Certiorari to review and reverse the Court of Appeals for the Eleventh Circuit, thereby correctly interpreting the statutes of Congress which are for the taxpayers' protection.

Respectfully submitted this the 15th day of May, 1993.

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Warren Simpson
Whitney Simpson
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APPENDIX

APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2087

JANET SIMPSON, WARREN SIMPSON,
WHITNEY SIMPSON and WESLEY SIMPSON,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
(February 16, 1993)

Before FAY and BIRCH, Circuit Judges, and KAUFMAN*,
Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JANET, WARREN, WHITNEY,
and WESLEY SIMPSON,

Plaintiffs, No. 91-30293 RV

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Pending is the defendant's motion to dismiss. (doc. 9). The plaintiffs have filed no response. See Local Rule 6(C). For the reasons stated herein, the defendant's motion is GRANTED.

This case arises under Title 26, United States Code, Section 7431. The plaintiffs, Janet Simpson, Warren Simpson, Whitney Simpson and Wesley Simpson, alleged that the defendant, through Special Agent Lynda Lee Kohl, sent out circular letters, without proper authorization, which requested financial information on the plaintiffs and Wilford Simpson. The letter allegedly stated that the Internal Revenue Service ("IRS") was conducting an investigation of Wilford Simpson, d/b/a "Ellis Ag., Inc. for the years 1984, 1985, 1986, and 1987, and requested the recipients to furnish information concerning payments they made to Wilford Simpson or Ellis Ag., Inc. The plaintiffs are members of the family of Wilford Simpson. Wilford Simpson himself is the plaintiff in a companion case, Simpson v. United States, Case No. 91-30102-RV, and arises from the same set of facts. See doc. 4.

The plaintiffs seek damages for unauthorized disclosure of return information pursuant to Title 26, United States Code, Sections

6103 and 7431. Federal tax returns and return information are confidential and may not be disclosed by officers or employees of the United States except as authorized by Title 26. See 26 U.S.C. Section 6103(b). "Return information" refers to:

"[A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, or liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense." 26 U.S.C. Section 6103(b)(A).

The term "taxpayer identity" includes "the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof."[1] The primary purpose of Section 6103 is to restrict access of other governmental bodies and agencies to return information. See, e.g., ***Chamberlain v. Kurtz***, 589 F.2d 827, 835 (5th Cir.), ***cert. denied***, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1979); ***Haywood v. United States***, 642 F.Supp. 188, 192 (D.Kan. 1986).

Section 7431 of the Internal Revenue Code permits a taxpayer to bring a civil suit for damages for violations of the disclosure restructions in Section 6103.[2] However, the defendant contends that Section 7431 creates no cause of action in favor of the plaintiffs. I agree that the allegations of the complaint are insufficient to state a claim for wrongful disclosure under Section 7431.

As an exception to the general doctrine of sovereign immunity, Section 7431 must be strictly construed. Section 7431(a) provides:

"If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, ***such taxpayer*** may bring a civil action for damages against the

United States in a district court of the United States." 26 U.S.C. Section 6103(a)(1) (emphasis added).

Thus, in order to demonstrate one's standing to bring suit, one must demonstrate that an agent or employee of the United States disclosed return or return information with respect to that taxpayer. At most, the complaint alleges that the unauthorized correspondence communicated to the addressees the fact that the IRS was conducting an investigation of Wilford Simpson and Ellis Ag., Inc., and requested information surrounding payments made to the same. The plaintiffs do not allege that the letter revealed any "return information" with respect to the plaintiffs, with the possible exception of the plaintiffs' identity. The plaintiffs do not allege that the letter stated that the plaintiffs were under investigation by the IRS, or subject to being investigated, or suspected of any wrongdoing whatsoever. Nor are there any allegations that the letters made any reference at all to plaintiffs' statuses as taxpayers.

"[T]he clear congressional intent underlying section 7431 is that only the taxpayer whose return information has been disclosed has a cause of action." ***Brown v. United States***, 755 F.Supp. 285, 286 (N.D.Cal. 1990). See also ***Haywood v. United States***, 642 F.Supp. 188 (D.Kan. 1986). In ***Datamatic Service Corp. v. United States***, 88-1 U.S. Tax Cas. (CCH) 9163, p. 83,221 (N.D. Cal. 1987), the plaintiff contended that a prefiling notification letter had illegally disclosed return information by (1) identifying the tax shelter promotion which it promoted, and (2) stating that the IRS was disallowing deductions based on the promotion based on its review of the promotion, which implied that the plaintiff was under investigation. ***Id.*** at p. 82,222. The court rejected the plaintiff's claim:

"The statute does not define 'taxpayer identity' merely as 'the name of a person,' but goes on to modify the latter phrase by the words 'with respect to whom a return is filed.' One reading of this modification would be that the IRS cannot disclose, for any purpose or in any context not covered by an exception, the name of anyone who files any sort of 'return.' This, of course, would mean just about everyone. Another, and in this Court's view, more sensible reading of the provision is that the modification as prohibiting disclosure of a person's name only when such disclosure pertains to the person's status as a taxpayer or his/her obligation to file a return." ***Id.***

The court observed that the reference to Datamagic pertained neither to the plaintiff's status as a taxpayer nor its obligation to file a return of any sort. Rather, the reference to Datamagic served merely to identify the promotion under examination. "To the extent that this reference pertained to DSC as a separate entity at all, it did so in connection with DSC's status as a ***promoter***, independent of any obligations DSC may have had as a ***taxpayer***." Id. at pp. 83,222-83,223 (emphasis in original).

I agree with the Northern District of California that in order to state a claim for wrongful disclosure of return or return information under Section 7431, there must some allegation of a link between the alleged disclosures and the plaintiff's status as a taxpayer. Because no such link has been alleged in this case, the plaintiffs have failed to state a cause of action under Section 7431 and dismissal is appropriate. Accordingly, the defendant's motion to dismiss is GRANTED, and the complaint is DISMISSED.

DONE AND ORDERED this 27th day of November, 1991.

ROGER VINSON
United States District Judge